IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

KINSEY K. CULP, JR., individually and d/b/a Culp Paving d/b/a Stor-All of Morgantown, and SHIRLEY A. CULP, individually and d/b/a Stor-All of Morgantown,

Plaintiffs,

v. // CIVIL ACTION NO. 1:00CV59
(Judge Keeley)

ERIE INSURANCE EXCHANGE,

Defendant.

MEMORANDUM OPINION AND ORDER GRANTING
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Before the Court is defendant Erie Insurance Exchange's ("Erie") motion for summary judgment [Docket No. 20], which seeks a declaration that under its Ultraflex Package Policy issued to its insured, Chester Yoder d/b/a Sturdi Built Pole Buildings ("Yoder"), Erie has neither the duty to defend nor the duty to indemnify Yoder in a civil action currently pending in the Circuit Court of Monongalia County against both the plaintiffs, Kinsey K. Culp, Jr., and Shirley A. Culp ("Culps"), and Yoder.

The pertinent issues presented by Erie's motion for summary judgment are: (1) Whether the occurrence at issue would be covered under the "completed operations hazard" provision in the policy; and,

if so, (2) whether coverage under the "completed operations hazards" provision extended beyond the cancellation date of the policy?

The Court **GRANTS** defendant Erie's motion for summary judgment, finding that the occurrence at issue would have been covered by the "completed operations hazard" provision had the provision's coverage not previously expired with the cancellation of the policy.

II. FACTS

A. Procedural History

In the complaint that Erie removed from the Circuit Court of Monongalia County, West Virginia to this Court, the Culps allege that they, along with Erie's insured, Yoder, are being sued in a separate lawsuit in the Circuit Court of Monongalia County[1] by their lessees for the losses their lessees suffered when a fire damaged or destroyed the Culps' storage units in September 1997. The Culps assert that the September 1997 fire was caused by Yoder's negligent design and construction of the storage facility. Yoder is not a party to the litigation before this Court.

[1] Anderson, et al. v. Culp, et al., Civil Action No. 99-C-372.

Yoder constructed the storage facility in 1991, pursuant to a contract with the Culps.[2] At the time of construction, he provided the Culps with certificates of insurance from Erie, detailing the coverage he had purchased.

The Culps allege that Erie has refused to investigate their coverage claims, and to defend or indemnify them in the lawsuit pending in Monongalia County. Thus, Count One of their complaint seeks a declaration that Erie is obligated to defend them in the underlying state case, and Count Two seeks declaratory relief with respect to Erie's indemnity obligation. Count Three claims that Erie breached its contract with Yoder, and Count Four seeks specific performance of the contract between Erie and Yoder. Count Six alleges that Erie's conduct violates the West Virginia Unfair Trade Practices Act. The Court previously dismissed the common law bad faith claim alleged in Count Five finding, from the facts as set forth on the record, that no contractual relationship existed between the Culps and Erie. See Elmore v. State Farm Mut. Auto Ins., 504 S.E.2d 893 (W. Va.

[2] The proposal prepared by Yoder to furnish material and labor to Culp Paving to construct a three storey post frame building for $109,706.00, was signed "as accepted" by Kinsey Culp on December 1, 1990. The contract includes a statement that "All material is guaranteed to be as specified. All work to be completed in a workmanlike manner according to standard practices. . . All agreements contingent upon strikes, accidents or delays beyond our control. Owner to carry fire, tornado and other necessary insurance."

1998)(establishing that a third party cannot bring a cause of action for common law bad faith in West Virginia, absent the existence of a contractual relationship).

B. Insurance Policy

The insurance policy at issue is an Ultraflex Package Policy, initially issued by Erie to Yoder in May 1990, and renewed annually until May 6, 1993, when Yoder chose not to renew it. A certificate of insurance provided to the Culps by Erie shows that Yoder had "completed operations hazard" coverage under this policy.

The Ultraflex Package Policy defines "completed operations hazard" as including "all personal injury and property damage occurring away from premises that you own or rent arising out of your work that has been completed or abandoned." An "occurrence" is defined as "an accident, including continuous or repeated exposure to the same general, harmful conditions." "Property damage" means "(1) physical injury to or destruction of tangible property, including its loss of use." "Your work" is defined as "(1) work or operations performed by you or on your behalf; (2) materials, parts or equipment furnished in connection with such work or operations. Your work includes warranties

or representations made at any time with respect to the fitness, quality, durability or performance of your work."

The policy further states that it "applies to losses that occur during the policy period." In discussing liability protection, it states that "[w]e will pay for damages because of personal injury or property damage for which the law holds anyone we protect responsible and which are covered by your policy. We cover only personal injury and property damage which occurs during the policy period." See Policy at p.20.

In setting forth the policy exclusions, the policy states:

> [w]e do not cover under Personal Injury Liability (Coverage F) and Property Damage Liability (Coverage G): . . .
>
> (8) property damage to . . .
>
> > (d) that particular part of real property upon which operations are being performed by you or any contractor or subcontractor working directly or indirectly on your behalf, if the property damage arises out of those operations;
> >
> > (e) that particular part of any property that must be restored, repaired, or replaced because your work was faulty. We will cover property damage included in the products hazard and completed operations hazard. . . .
>
> (10) property damage to your work arising out of your work or any portion of it but only with respect to the completed operations hazard. This

> exclusion does not apply if the damages work or the work out of which the damage arises was performed on your behalf by a sub-contractor.

Policy at pp. 22-23.

C. Arguments of the Parties

In its motion for summary judgment, Erie contends that its policy is unambiguous and should be given its plain meaning. The policy applied to losses that occurred during the policy period only and the loss here occurred in September 1997 at the time of the fire, and not the date on which the allegedly faulty workmanship occurred. Erie further contends that the policy specifically excludes faulty workmanship from its coverage.

In response, the Culps argue that Yoder had purchased a "very comprehensive policy" from Erie and that several events occurred during the policy period that would trigger coverage, including the unintentional use of improper or defective materials, the unintentional failure by Yoder to follow standard practices and law, and the unintentional misrepresentation of his expertise and his warranty of workmanlike completion.

III. LAW

A. Summary Judgment

Summary judgment is appropriate "if there is no genuine issue of material fact. Charbonnages de France v. Smith, 597 F.2d 406 (4th Cir. 1979). An issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The party seeking summary judgment has the initial burden to show absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). This burden does not require the moving party to show evidence that proves absence of a genuine issue of material fact, but only to point out its absence. Id.

The burden then shifts to the party opposing the motion. The adverse party may not rest upon mere allegations or denials, Anderson, 477 U.S. at 248, and summary judgment is appropriate if the adverse party fails to show, under Rule 56, the existence of an element essential to that party's case. Celotex, 477 U.S. at 322. A mere scintilla of evidence supporting the case is insufficient. Anderson, 477 U.S. at 252. With regard to the burden on the adverse party, Rule 56(e) provides in part that:

> [w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or

> denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

B. Completed Operations Hazard Coverage

In Erie Ins. & Pioneer Home Improvement, 526 S.E.2d 28 (W. Va. 1999), the Supreme Court of Appeals of West Virginia analyzed the applicability of a "completed operations hazard" provision in an Ultraflex Package Policy issued by Erie. The case arose after Pioneer installed siding on a home owned by the Skanes. The Skanes were unhappy with the work performed by Pioneer and refused to pay the balance on the contract. Pioneer filed a mechanic's lien against the property and the Skanes then filed suit alleging breach of contract and slander of title. Erie, who insured Pioneer under its Ultraflex Package Policy, initially defended Pioneer under a reservation of rights, but then filed a declaratory judgment action against Pioneer.

The Circuit Court of Cabell County granted Erie's motion for summary judgment and Pioneer appealed, arguing that the claim was covered under the "completed operations hazard" coverage. The West Virginia Supreme Court of Appeals addressed whether the insurance policy in question indemnified the insured against damages in an action

against it for faulty workmanship and breach of contract where the damages were the costs of correcting the work itself. In affirming the trial court's grant of Erie's motion for summary judgment, the Supreme Court of Appeals extensively discussed the "completed operations hazard" provision of the policy, noting that "[i]t must be kept in mind that the insurance policy issued in the instant case is a liability policy, not a builder's risk policy, and [the insured] is seeking indemnity from Erie in an action brought by the contracting property owners grounded upon breach of contract." Id. at 31.

The decision cites to several other pertinent West Virginia cases, including Helfeldt v. Robinson, 290 S.E.2d 896 (W. Va. 1981) (concluding that policy at issue did not extend coverage for defective construction of home), and McGann v. Hobbs Lumber Co., 145 S.E.2d 476 (W. Va. 1965) (holding that a liability insurance policy, unlike a builder's risk policy, is designed to indemnify the insured against damage to other persons or property caused by his work or property, and is not intended to cover damage to the insured's property or work completed by him). The West Virginia Supreme Court of Appeals also cites supporting case law from Minnesota and Tennessee, and quotes at length from a case from Maine, Peerless Ins. v. Brennon, 564 A.2d 383 (Me. 1989):

> [T]he distinction between an "occurrence of harm risk" and a "business risk" is critical to understanding a comprehensive general liability insurance policy. An "occurrence of harm risk" is a risk that a person or property other than the product itself will be damaged through the fault of the contractor. A "business risk" is a risk that the builder will not do his job competently, and thus will be obligated to replace or repair his faulty work. The distinction between the two is critical to understanding a CGL policy. A CGL policy covers an occurrence of harm risk but specifically excludes a business risk.

Pioneer, 526 S.E.2d at 32, citing Peerless, 564 A.2d at 386.

This summary of existing case law led the court to conclude that commercial general liability policies, such as Erie's Ultraflex policy, do not insure the work or workmanship which the contractor or builder performs:

> They are not performance bonds or builders' risk polices. CGL policies, instead, insure personal injury or property damage arising out of the work. The "completed operations hazard" coverage applies to collateral property damage or personal injury caused by an occurrence "arising out of your work that has been completed or abandoned."[3]

[3] In its discussion, the Pioneer court cites an analogy used by the New Jersey Supreme Court in Weedo v. Stone-E-Brick, 405 A.2d 788, 796 (NJ 1979), to explain the distinction between an occurrence of harm risk and a business risk. When a craftsman applies stucco to an exterior wall in a faulty manner resulting in discoloration, peeling and chipping, the work has to be replaced or repaired by the craftsman. This is a "business risk" and would not be covered by a CGL policy. On the other hand, if the stucco falls off the wall and injures the home-owner, a neighbor or passing automobile, an occurrence of harm occurs which would be covered by this type of policy, whether liability is predicated on a

Pioneer, 526 at 33.

Pioneer, thus, makes clear that, under West Virginia law, damages caused by faulty workmanship are not covered by a contractor's general liability policy of insurance but are instead a business risk to be borne by the contractor. By comparison, in the case sub judice the loss of property resulted from Yoder's alleged negligence in constructing the storage units -- an "occurrence of harm risk," as opposed to a "business risk." Yoder's alleged negligence resulted not in the fact that work he had performed had to be repaired or replaced, but in the fact that a fire occurred causing extensive property damage. Accordingly, Erie's Ultraflex Package Policy, which provided coverage for "completed operations hazard" coverage, would cover the property damage at issue in the underlying State court litigation, assuming that such coverage was in effect at the time of the occurrence at issue.

C. Date of Injury

The Culps argue that the event triggering coverage under the policy was Yoder's negligence and not the fire. As they conceded at a hearing held on November 3, 2000, however, the two cases upon which

warranty theory or a tort concept. Pioneer, 526 S.E.2d at 33.

they rely are distinguishable as both deal with progressive injury claims.

Erie, on the other hand, relies upon several cases that hold that the date of injury is not the time the wrongful act was committed but the date on which the complaining party was actually damaged. See Maples v. Aetna Cas. & Sur., 83 Cal. App. 3d 641 (1st Dist. 1978); Tiedemann v. Nationwide, 324 A.2d 263 (Conn. 1973); Prudential Property v. Stuckey, 486 So.2d 352 (La. 1986). See also Shamblin v. Nationwide, 332 S.E.2d 639 (W. Va. 1985) (holding that "occurrence" in a limitation of liability clause within an automobile policy refers to the resulting event for which the insured becomes liable and not to some antecedent cause or causes of injury).

The Court could not find, and counsel has not identified, any cases directly on point in either West Virginia or the Fourth Circuit regarding whether the period of coverage for completed operations hazard claims is the same as for the policy as a whole, or whether it extends beyond the life of the policy. Based on the following cases from other jurisdictions, the Court concludes that it is the same.

In Travelers Ins. Co. v. C.J. Gayfer's, 366 So.2d 1199 (Fla. 1979), the court held that the fact that the definition of "completed operations" was silent as to the period of coverage did not create an

ambiguity so as to permit the policy to be construed as affording "completed operations" coverage of property damage that occurred after expiration of the policy. In Gayfer's, a contractor installed a roof drainage system during the policy period and, after the policy expired, a joint in the drainage system failed discharging water into Gayfer's store. Gayfer filed suit under various theories of negligence and implied warranty. The trial court granted partial summary judgment against the insurer on the issue of coverage. The appellate court reversed and remanded, noting that:

> The definition of completed operations does not mislead; it is simply silent as to the period of coverage. Insurance contracts commonly provide coverage for specified periods of time. An insured would expect to find a time limitation expressed in the policy, and would not reasonably assume, after reading only the completed operations definition, that he could cease paying premiums but enjoy completed operations coverage indefinitely.

Id. at 1201.

In Harbour v. Mid-Continent Cas. Co., 752 P.2d 258 (Okla. 1987), the court held that a "completed operations hazard" endorsement in a furnace installer's policy restricted coverage to bodily injury or property damage occurring during the policy period. "A Completed Operations Hazard endorsement insures a contractor against accidents

which might occur during the policy period but after completion of the project, at which point general liability no longer provides coverage." Id. at 260-61, citing Acorn Ponds v. Hartford Ins., 481 N.Y.S2d 392 (1984). See also Deodato v. Hartford Ins. Co., 363 A.2d 361 (NJ 1976) (holding that insurer was not obligated to defend negligence action which arose out of occurrence five months after the policy was canceled, even though the policy contained a "completed operations" provision, because to be liable under the terms of the policy the occurrence must arise during the policy period); Singsaas v. Diederich, 238 N.W.2d 878 (Minn. 1976) (finding that policy which contained completed operations hazard endorsement was limited to providing coverage for accidents occurring within the policy period and did not provide coverage for injuries occurring after insured canceled the policy). See generally Event Triggering Liability Insurance Coverage, as Occurring within Period of Time Covered by Liability Insurance Policy Where Injury or Damage is Delayed, § 16(b), Martin J. McMahon, 14 ALR5th 695 (1993, Supp. Aug. 1999).

From a policy viewpoint, Yoder purchased insurance from Erie for three years and, under the Ultraflex policy's "completed operations hazard" provision, his work on the Culps' storage facility was covered from the date of its completion until the policy expired on May 6,

1993, more than four years before the September, 1997 fire. The policy plainly and unambiguously provides coverage only for personal injury and property damage that occurs during the policy period. There is no need to interpret an unambiguous policy so as to extend the insured's "completed operations hazard" insurance indefinitely. This was not part of Erie's contract with Yoder. Accordingly, given the silence of the "completed operations hazard" definition as to its period of coverage, the Court concludes that it ran for the same period of time as the rest of the policy; consequently, it expired in May 1993.

IV. CONCLUSION

Erie has no duty to defend or indemnify its insured, Yoder, or the third-party Culps, and its motion for summary judgment is **GRANTED.** The Clerk is directed to strike this case from the docket of the Court.

It is so **ORDERED**.

The Clerk is directed to transmit certified copies of this Order to all counsel of record.

DATED: November 16, 2000.

/s/
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IRENE M. KEELEY
UNITED STATES DISTRICT JUDGE